

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MONA L. SONNENSHEIN et al.,

Plaintiffs and Respondents,

v.

WINDANSEA BEACH HOMES et al.,

Defendants and Appellants.

D053488

(Super. Ct. No. 37-2008-00081684-CU-MC-CTL)

APPEAL from an order of the Superior Court of San Diego County, Ronald Prager, Judge. Affirmed.

WindanSea Beach Homes, LLC (WindanSea) and its managing agents, Rod McPherson and Michael Krambs (collectively with WindanSea, Defendants), appeal an order denying their petition to compel arbitration of the claims made by plaintiffs Mona L. Sonnenshein and Jay L. Sonnenshein (the Sonnensheins). The trial court declined to enforce an arbitration agreement to which WindanSea and the Sonnensheins are parties, but to which other defendants were not, to avoid the possibility of conflicting rulings on common issues of law or fact in accordance with subdivision (c) of section 1281.2 of the Code of Civil

Procedure (hereinafter, section 1281.2(c)). (All undesignated statutory references are to the Code of Civil Procedure.) We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

In March 2006, the Sonnensheins entered into a residential purchase and sale agreement (the Agreement) with McPherson and Krambs to purchase a home in La Jolla, California constructed by WindanSea and defendant Jaynes Corporation of California (Jaynes), a general contractor. Defendants Maxine Gellens, Marti Jo Gellens-Stubbs and Terry L. Fuller, through their employer, defendant Pickford Real Estate, Inc. (Pickford, collectively with Gellens, Gellens-Stubbs and Fuller, the Brokers), acted as the agents and brokers for the Sonnensheins and WindanSea.

The Agreement was set forth on a preprinted January 2006 version of the California Association of Realtors, Inc. form RPA-CA. It provided that the buyer and seller agreed to mediate any dispute arising out of the Agreement before resorting to arbitration or court action. Paragraph 17B of the Agreement, entitled "ARBITRATION OF DISPUTES" stated:

"(1) Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration . . . . The arbitrator . . . shall render an award in accordance with substantive California Law. The parties shall have the right to discovery in accordance with California Code of Civil Procedure § 1283.05. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part III of the California Code of Civil Procedure. Judgment upon the award of the arbitrator(s) may be entered into any court having jurisdiction. Interpretation of this agreement to arbitrate shall be governed by the Federal Arbitration Act.

".....

"NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW. . . ."

The Sonnensheins took possession of the home and noticed numerous alleged construction defects. After WindanSea could not resolve the problems, the Sonnensheins retained counsel and unsuccessfully mediated the dispute with WindanSea and Jaynes on April 1, 2008. On April 7, Defendants sent a letter to the Sonnensheins' counsel demanding that they arbitrate the dispute. The following day, the Sonnensheins filed a complaint seeking rescission of the Agreement and alleging a number of causes of action against Defendants and the Brokers for damages.

Specifically, the Sonnensheins alleged that Defendants and the Brokers intentionally and negligently misrepresented that there were no material facts to disclose regarding the home when they knew or should have known that the home had been plagued by numerous material and construction defects. They also alleged that: the Brokers breached their fiduciary duties by not disclosing the construction defects; Krambs and McPherson breached the Agreement; and WindanSea and Jaynes negligently constructed the home.

Defendants petitioned the trial court to compel arbitration and stay the action, citing the arbitration provision in the Agreement. The trial court denied the petition finding, among other things, there was a risk of conflicting rulings because the Brokers and Jaynes were not parties to the arbitration provision. Defendants timely appealed.

## DISCUSSION

### I. *Federal Preemption*

Defendants assert the trial court erred in denying their petition to compel arbitration because the Federal Arbitration Act (the FAA, 9 U.S.C. § 1 et seq.) governed the Agreement and prevented the trial court from exercising its discretion under section 1281.2(c).

Defendants admit they failed to "clearly voice" this argument until they filed their opening brief on appeal, but claim the Sonnensheins had "constructive notice" that arbitration should be compelled under the FAA.

We have reviewed Defendants' petition to compel arbitration, their reply to the Sonnensheins' opposition, and the reporter's transcript of oral argument on the petition. Defendants *never* mentioned the FAA below; rather, they sought arbitration under the California Code of Civil Procedure essentially conceding that the arbitration provisions of Title 9 the California Code of Civil Procedure governed the Agreement. Despite this defect, we exercise our discretion to address the issue on its merits because it involves questions of statutory construction and interpretation of a contract that are reviewed under the de novo standard. (*Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1116-1117.)

The FAA compels judicial enforcement of arbitration agreements in transactions affecting interstate commerce (*Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 273-275, 281) and was intended to overcome a historical judicial hostility to arbitration agreements (*Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 626, fn. 14). Under federal law, an arbitration provision is "valid, irrevocable, and enforceable"

except on legal or equitable grounds which properly apply to all contracts. (9 U.S.C. § 2; *Perry v. Thomas* (1987) 482 U.S. 483, 492-493, fn. 9 (*Perry*).) Accordingly, the FAA preempts state laws, whether legislative or judicial, disfavoring arbitration agreements in particular, but does not preempt state laws applicable to contracts generally. (*Perry, supra*, 482 U.S. at p. 492, fn. 9; *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 323-324.)

Section 1281.2(c) gives a trial court the discretion to refuse to enforce an arbitration agreement if a party to the agreement is also a party to a pending court case with a third party and there is a possibility of conflicting rulings on a common issue of law or fact. The court may refuse to compel arbitration, or it may stay either the arbitration or the court proceeding pending completion of the proceedings in the other forum. (§ 1281.2(c).) The Legislature included section 1281.2(c) in the statutory scheme governing arbitration "so that common issues of fact and law will be resolved consistently, and only once." (*Mount Diablo Medical Center v. Health Net of California, Inc.* (2002) 101 Cal.App.4th 711, 727.) The concept of "conflicting rulings" extends to duplicative and inconsistent rulings in proceedings arising out of the same transaction or series of related transactions. (See, e.g., *Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 483, 488 (*Whaley*).)

Unlike California law, the FAA contains no "provision allowing a court to stay arbitration pending resolution of related litigation." (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 470 (*Volt*).) In *Volt*, however, the United States Supreme Court upheld section 1281.2(c)'s application to an arbitration provision governed by the FAA. The construction contract for work to be performed in California contained a clause applying "the

law of the place where the Project is located." (*Id.* at p. 470.) The high court concluded that the FAA did not preempt application of section 1281.2(c) "where, as here, the parties have agreed to arbitrate in accordance with California law." (*Id.* at p. 477.) It reasoned: "Just as [parties] may limit by contract the issues which they will arbitrate, [citation], so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the [FAA] would otherwise permit it to go forward." (*Volt, supra*, 489 U.S. at p. 479.)

The United States Supreme Court subsequently reaffirmed *Volt's* distinction between the procedural and substantive aspects of the FAA, describing section 1281.2(c) as "determin[ing] only the efficient order of proceedings [and] it did not affect] the enforceability of the arbitration agreement itself." (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 688.)

The California Supreme Court has similarly held that section 1281.2(c) neither conflicts with the FAA's provisions nor undermines or frustrates its policies. (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 394 (*Cronus*).) In *Cronus*, the parties agreed that their arbitration agreement would be governed by California law, but they further agreed that the designation of California law "' . . . shall not be deemed an election to preclude application of the [FAA], if it would be applicable.'" (*Id.* at p. 381, fn. omitted.) The court held that section 1281.2(c) is not a special rule limiting the authority of arbitrators, but rather "an evenhanded law that allows the trial court to stay arbitration

proceedings while the concurrent lawsuit proceeds or stay the lawsuit while arbitration proceeds to avoid conflicting rulings on common issues of fact and law amongst interrelated parties." (*Id.* at p. 393, italics omitted.) The court also noted that section 1281.2(c) is "part of California's statutory scheme designed to enforce the parties' arbitration agreements, as the FAA requires" and that the discretion provided by this section to not enforce an arbitration agreement does not contravene the letter or the spirit of the FAA. (*Ibid.*)

Here, the parties agreed to arbitrate any dispute arising out of the Agreement as provided by California law: they could be compelled to arbitrate and had the right to discovery in accord with California law; the arbitrator would render an award in accordance with substantive California law; and the arbitration would be conducted in accordance with "Title 9 of part III of the California Code of Civil Procedure," which is the California Arbitration Act. Accordingly, they clearly intended that California procedural law apply, including section 1281.2(c). The parties' understanding "[i]nterpretation of this agreement to arbitrate shall be governed" by the FAA does not change this result because both the FAA and California law express a strong public policy of enforcing arbitration agreements. (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1074-1075.) Thus, we reject Defendants' argument that the FAA prevented the trial court from exercising its discretion under section 1281.2(c).

## II. *Application of Section 1281.2(c)*

Defendants argue that, even if section 1281.2(c) applied, the Sonnensheins "gamed" section 1281.2(c) by improperly adding third parties to the complaint and the trial court erred by choosing the harshest option of denying arbitration, rather than staying either the

arbitration or the court proceeding pending completion of the proceedings in the other forum. (§ 1281.2 (c).) We review this ruling for abuse of discretion (*Whaley, supra*, 121 Cal.App.4th at p. 484) and reject Defendants' assertions.

Jaynes and the Brokers are not peripheral parties to the dispute between Defendants and the Sonnensheins. The complaint alleged that WindanSea and Jaynes, acting together, negligently constructed the property. Based on this allegation, the trial court properly found that compelling arbitration as to Defendants created a significant risk of conflicting rulings on responsibility for the construction defects. Moreover, Defendants cannot argue that Jaynes is an improper party because Jaynes participated in the mediation proceeding at WindanSea's request. The complaint also alleged the part the Brokers played in the sales transaction and their connection to the Defendants. Nothing in the record suggests the Sonnensheins added the Brokers to avoid arbitration. Indeed, it is possible, perhaps likely, that Jaynes and the Brokers will be filing cross-complaints as this litigation progresses.

Although counsel for Jaynes and the Brokers were present for the oral argument on the petition, both indicated that their respective clients were not parties to the Agreement and neither took the opportunity to indicate a willingness to participate in arbitration. Accordingly, the trial court correctly concluded that the conditions of section 1281.2(c) were met and selected one of the options expressly authorized by statute, namely, refusing to compel arbitration. (*C.V. Starr & Co. v. Boston Reinsurance Corp.* (1987) 190 Cal.App.3d 1637, 1642 [the strong public policy favoring arbitration must give way to the Legislature's express directive authorizing the trial court in its discretion to refuse enforcement of an arbitration agreement where there is a possibility of conflicting rulings].)

We reject Defendants' suggestion that estoppel by contract (Evid. Code, § 622) or equitable estoppel (Civ. Code, § 3521) should apply to prevent the Sonnensheins from avoiding the arbitration provision while otherwise taking advantage of the Agreement. The Sonnensheins are not challenging the validity of the Agreement; rather, they are taking advantage of a *statutory* provision allowing the trial court to decline to enforce an arbitration provision in certain situations. We are unaware of any authority applying estoppel principles to prohibit trial courts from doing what the Legislature has expressly authorized trial courts to do. Simply put, Defendants have not shown that the trial court abused its discretion when it denied the petition to compel arbitration.

As a final desperate measure to avoid this result, Defendants assert for the first time in their *reply* brief on appeal that the arbitration provision in the *preprinted form* Agreement cited to Title "8" of the Code of Civil Procedure concerning name changes and not Title "9" concerning arbitration. They also assert that the Agreement cited to discovery under section "1283.06," a statute they admit does not exist, rather than section "1283.05." Review of the arbitration provision in the appellants' appendix shows that the entire page is blurry. While the "9" looks like an "8" and the "5" looks like a "6," most of the "S's" on the page also look like the number "8."

We asked the party in possession of the original Agreement to lodge the page containing the arbitration provision with the court. The Sonnensheins lodged the document and it clearly references Title 9 and section 1283.05. Accordingly, we reject Defendants' argument that the parties did not agree to arbitration under Title 9 of Part III of the California Code of Civil Procedure.

As an aside, we question why counsel for the Defendants did not seek a more legible copy of the Agreement before representing to the court that the Agreement "clearly" and "undisputed[ly]" referenced Title 8. We remind counsel for the Defendants that an attorney has a duty "[t]o employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by any artifice or false statement of fact or law." (Bus. & Prof. Code, § 6068, subd. (d).)

#### DISPOSITION

The order is affirmed. Respondents are entitled to their costs on appeal.

---

MCINTYRE, J.

WE CONCUR:

---

BENKE, Acting P. J.

---

IRION, J.